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Attorneys for Post-Effective Date USA Capital Diversified Trust Deed Fund, LLC

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

In re:
USA COMMERCIAL MORTGAGE
COMPANY,
USA CAPITAL REALTY ADVISORS, LLC,
USA CAPITAL DIVERSIFIED TRUST DEED
FUND, LLC,
USA CAPITAL FIRST TRUST DEED FUND,
LLC,
USA SECURITIES, LLC,
Debtors.

Affects:

- ☐ All Debtors
☒ USA Commercial Mortgage Company
☐ USA Capital Realty Advisors, LLC
☒ USA Capital Diversified Trust Deed
Fund, LLC
☐ USA Capital First Trust Deed Fund, LLC
☐ USA Securities, LLC

Case No. BK-S-06-10725-LBR
Case No. BK-S-06-10726-LBR
Case No. BK-S-06-10727-LBR
Case No. BK-S-06-10728-LBR
Case No. BK-S-06-10729-LBR

CHAPTER 11

Jointly Administered Under
Case No. BK-S-06-10725 LBR

**OBJECTION OF USACM TRUST TO
MICHAEL H. RICCI'S CLAIM FILED
IN WRONG DEBTOR'S CASE;
OBJECTION OF DTFD TO PROPOSED
ALLOWANCE OF CLAIM; AND
CERTIFICATE OF SERVICE**

Hearing Date: October 15, 2007
Hearing Time: 9:30 a.m.

Michael H. Ricci ("Ricci") filed Proof of Claim No. 10725-01641 against USA
Commercial Mortgage Company ("USACM") in the amount of \$136,058.88. The

1 USACM Liquidating Trust (the “USACM Trust”) hereby objects to Ricci’s claim. The
2 basis for the claim is shown on the face of the proof of claim and in the attachment as an
3 investment in USA Capital Diversified Trust Deed Fund, LLC (“DTDF”). Accordingly, it
4 is a claim that was incorrectly filed in the USACM case. The USACM Trust respectfully
5 requests that this claim be disallowed as a claim against USACM. Although DTDF has
6 not yet filed a formal proof of claim against USACM, and there is no deadline for it to do
7 so, DTDF has informally asserted a claim in excess of \$100 million and the parties have
8 participated in one unsuccessful mediation on this and other issues. Because DTDF does
9 assert a significant claim against USACM, any claim held by Ricci against USACM solely
10 on account of the investment in DTDF is derivative of DTDF’s claims against USACM,
11 and Ricci may not prosecute such claims on Ricci’s own behalf.

12 In *In re Van Dresser Corp.*, plaintiff was a shareholder of Van Dresser, which
13 owned two subsidiaries.¹ The president of Van Dresser looted the subsidiaries, ultimately
14 forcing them and Van Dresser into bankruptcy. The plaintiff had guaranteed \$1.125
15 million in loans to the debtor, and had to repay them when debtor defaulted. Plaintiff then
16 sued the debtor’s principal, and two other defendants (who he alleged aided and abetted
17 the corporate looting) for various torts, including conversion, breach of fiduciary duty, and
18 civil conspiracy.

19 The court stated that a debtor’s trustee has the exclusive right to assert a debtor’s
20 claims, and that a claim belongs solely to the debtor’s estate if the debtor could have raised
21 the claim at the commencement of the bankruptcy case.² Additionally, if a judgment
22 against a defendant by either the debtor or another party asserting the debtor’s claim
23

24 ¹ *In re Van Dresser Corp.*, 128 F.3d 945 (6th Cir. 1997).

25 ² *Id.* at 947 (citing *In re Educators Group Health Trust*, 25 F.3d 1281, 1284 (5th Cir. 1994); see
26 also *In re Real Marketing Services, LLC*, 309 B.R. 783 (S.D. Cal. 2004) (citing *Van Dresser* with
approval in a case involving an LLC debtor).

precludes the other from recovery, then the claims are not independent of each other and belong exclusively to the debtor.³

Thus, because both the plaintiff and the debtor corporation could state claims for damages against the defendants, but only one could recover on those claims, by default the claims were exclusively property of the Van Dresser trustees.⁴ In order for a plaintiff to bring a claim, either the trustee must have truly abandoned the claim, or the plaintiff must be able to allege a distinct and specific injury.⁵

Similarly, in *In re Real Marketing*, the debtor had attempted to enter into an asset purchase agreement that specifically included the assumption of debt owed to the debtor's managing member. The agreement fell through, and after the managing member filed an involuntary petition for relief against the debtor, the managing member asserted various causes of action against the purchasing company, including contract claims, debt assumption claims, misrepresentation claims, and interference claims.⁶ The court, however, found that all of the claims involved both the debtor's managing member and the debtor itself, and thus the right to pursue all of the causes of action resided with the trustee.⁷

DTDF further objects to any allowance of Ricci's claim as a claim against the DTDF estate. DTDF has determined that Ricci has two allowed proofs of interest in the DTDF case: \$34,650.65 in account no. 11384, and \$96,094.65 in account no. 18138, for a

³ *Id.*

⁴ *Id.* at 948.

⁵ *Id.* at 949 (for example, a claim for the attorneys' fees plaintiff incurred defending the suits on the guaranty).

⁶ *In re Real Marketing*, 309 B.R. 783, 786-87 (S.D. Cal. 2004).

⁷ See also *In re Ionosphere Clubs, Inc.*, 156 B.R. 414 (S.D.N.Y. 1993) (courts determine whether action is individual or derivative based on state law, and the preferred shareholders breach of fiduciary duty claims were derivative per Delaware law); *In re Van Dresser*, 128 F.3d at 947 ("whether a creditor has sole right to a cause of action is determined in accordance with state law").

1 total of \$130,745.30, which roughly corresponds to the amount of the Ricci claim. This
2 objection does not seek to prejudice the rights of Ricci as a DTDF member to recover from
3 the DTDF estate on a pro rata basis on account of Ricci's membership interest in the
4 amounts of \$34,650.65 and \$96,094.65. Ricci shall retain an interest in DTDF in the
5 amounts of \$34,650.65 and \$96,094.65, as reflected in the books and records of DTDF,
6 and Ricci is entitled to receive distributions on a pro rata basis with all other DTDF
7 members.

8 Accordingly, the USACM Trust and DTDF seek entry of an order that will disallow
9 Ricci's claim against USACM, disallow any proposed allowance of Ricci's claim in the
10 DTDF case, and appropriately allow Ricci to retain an equity interest in DTDF in the
11 amount of \$34,650.65 and \$96,094.65, as reflected in the books and records of DTDF as
12 of April 13, 2006.

13 This objection is made pursuant to Bankruptcy Code section 502, Federal Rule of
14 Bankruptcy Procedure 3007, and Local Rule of Bankruptcy Practice 3007.

15 Dated: September 14, 2007.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served via first class mail, postage prepaid, addressed as set forth below, on this 14th day of September, 2007 to:

Michael H. Ricci
1204 Camballeria Drive
Carson City, NV 89701-8655

By /s/ Patricia M. Kois
Patricia M. Kois, Lewis and Roca LLP